(3) (2)

Nos. 85-1253 and 85-1288

In the Supreme Court of the United States

OCTOBER TERM, 1985

EAGLE-PICHER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

RAYMARK INDUSTRIES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

JOSEPH B. COX, JR.
DAVID S. FISHBACK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

32pp

QUESTION PRESENTED

Whether manufacturers of asbestos products sued by shipyard workers who contracted asbestos-related diseases may bring third-party suits seeking contribution and indemnity from the United States, which was the employer of the shipyard workers and the owner of the vessels on which the workers were exposed to asbestos.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a)[1] is reported at 772 F.2d 1023. The opinions of the district court (Pet. App. 18a-26a, 27a-58a) are reported at 589 F. Supp. 1571 and 581 F. Supp. 963.

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[1] "Pet App." citations are to the appendix to the petition in No. 85-1253.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1985. A petition for rehearing was denied on October 30, 1985 (Pet. App. 90a-91a). The petitions for a writ of certiorari were filed on January 24 and January 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arose out of suits brought by more than one hundred present or former civilian employees of the United States Portsmouth Naval Shipyard or by their survivors against petitioners and other manufacturers of asbestos products. Plaintiffs alleged that the shipyard workers suffered disability or wrongful death as a result of exposure to asbestos contained in petitioners' insulation products used at the shipyard.[2] Plaintiffs did not sue the United States. Since the shipyard workers were government employees, plaintiffs' exclusive remedy against the United States was under the Federal Employees' Compensation Act (FECA), which provides no-fault compensation for work-related injury or death. 5 U.S.C. 8101, 8116(c). Petitioners, however, brought this third-party action against the United States, alleging nine claims for relief.[3] Pet. App. 2a-3a.

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[2] The shipyard workers included members of various trades. Plaintiffs allege that the shipyard workers were exposed to asbestos dust when insulation containing asbestos was cut, which occurred both in workshops on land and aboard ships, and when old insulation was ripped out of ships. The plaintiffs claim that petitioners failed to warn of the products' dangers or take other precautions to prevent injury to the shipyard workers.

[3] Petitioners' model third-party complaint is set forth at Pet. App. 94a-107a.

2. In 1984 the district court dismissed all the third-party claims against the United States except for those claims contained in Count VI of the complaint (Pet. App. 55a-58a). Count VI alleged that the United States, as operator of the Portsmouth Naval Shipyard and owner of the vessels on which the shipyard employees worked, failed to warn the workers about the dangers of exposure to asbestos or take other steps to protect the plaintiffs (*id.* at 102a-104a). In denying the government's motion to dismiss Count VI, the district court began by noting (*id.* at 22a) that, under the Federal Tort Claims Act (FTCA), the United States is subject to liability "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674).[4] The court reasoned that a private individual under like circumstances is "a compensation-paying private shipyard employer in Maine" (Pet. App. 23a). The court concluded that the United States could not be sued by petitioners "in its capacity as an employer" because it was clear, under the Maine Workers' Compensation Act (MWCA), that an employer who paid compensation to an employee could not be sued directly in its capacity as employer and was also immune from third-party claims for contribution or indemnity (*ibid.*).

However, the district court concluded that Maine law is unclear as to whether an employer could be sued under a "dual capacity" theory. Under such a theory, an employer may be liable to its employees

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[4] The district court also noted (Pet. App. 22a) that 28 U.S.C. 1346(b) provides that the United States is liable "under circumstances where * * * a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

and hence to third parties in some other capacity, such as its capacity as the owner of the property on which the employee was injured, even though an action against it as employer is barred by the exclusivity provision of a workers' compensation law. Because the court thought that it was unclear whether Maine courts would recognize a dual capacity theory, it did not dismiss Count VI, which alleged that the United States is liable in its capacity as owner of the vessels on which the employees worked.[5] The court determined that the proper course would be to certify the state law question to the Supreme Judicial Court of Maine, but that certification should not occur until after trial. Pet. App. 24a-26a. The district court then certified for interlocutory appeal all its rulings on the government's motion to dismiss (*id.* at 108a-109a).

3. The court of appeals agreed to review the district court's rulings as to Count VI (Pet. App. 110a), which it construed as including a claim that the United States is subject to suit in its capacity as

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[5] The court rejected the United States' argument, based on *Patterson* v. *United States*, 359 U.S. 495, 496 (1959), and *Johansen* v. *United States*, 343 U.S. 427, 436-440 (1952), that it did not matter whether Maine law would permit a dual capacity suit against an employer covered by the MWCA because the exclusivity provision of the FECA, 5 U.S.C. 8116 (c), bars suit against the United States in its capacity as vessel owner. The court stated that "[t]he relevant inquiry under the FTCA must be as to whether a private shipyard employer in Maine would be subject to liability to its employees for negligence in its capacity as a vessel owner. Such a private shipyard would not be protected by the *Johansen*/*Patterson* doctrine because the shipyard would not be covered by the FECA." Pet. App. 25a.

employer as well as a claim that the United States is liable in its capacity as vessel owner (*id.* at 6a).[6]

a. The court of appeals held that the district court had correctly dismissed the third-party tort claims against the United States in its capacity as employer (Pet. App. 7a-10a). The court relied on its decision in *Drake* v. *Raymark Industries, Inc.*, 772 F.2d 1007 (1st Cir. 1985), petition for cert. pending, No. 85-1246 (Pet. App. 59a-89a), where it held that a compensation-paying private shipyard owner in Maine is not subject to a third-party tort action brought by asbestos manufacturers (Pet. App. 9a).

In *Drake*, the court of appeals concluded that a private shipyard owner in Maine is subject to concurrent jurisdiction under the Maine Workers' Compensation Act, Me. Rev. Stat. Ann. tit. 39, §§ 1 *et seq.* (1978 & Supp. 1985), and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. I) 901 *et seq.*, each of which contains an exclusivity provision barring tort actions against employers. Me. Rev. Stat. Ann. tit. 39, § 4 (Supp. 1985); 33 U.S.C. 905(a). The court rejected the asbestos manufacturers' contention that under *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190 (1983), their third-party claims against the private shipyard were not barred by the exclusivity provisions of the applicable workers' compensation laws. The court of appeals explained that while the Court had held in *Lockheed* that the exclusivity provision of the FECA did not itself bar a third-party tort suit, the Court also stressed that "the underlying substantive law granting Lockheed a right to indemnifi-

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[6] The court of appeals declined to review on interlocutory appeal the dismissal of the asbestos manufacturers' other claims (Pet. App. 110a-111a).

cation was uncontroverted" (Pet. App. 84a; see 460 U.S. at 197 n.8, 199). Therefore, the court of appeals concluded, even if the applicable exclusivity provisions did not bar a third-party claim, there remained the issue "whether there is a basis in substantive law for defendants' third-party action" against the private shipyard (Pet. App. 84a). The court found no basis for a third-party action. It concluded in *Drake* that "there can be no doubt that the Maine Act bars this third-party action" (*id.* at 85a) and that "contribution actions against the compensation-paying employer" are barred by the exclusivity provision of the LHWCA (*id.* at 86a). Relying on its decision in *Drake*, the court found that the asbestos manufacturers had no basis for their third-party claims against the United States in its capacity as employer in this case (*id.* at 9a).

The court of appeals also rejected the asbestos manufacturers' argument that the United States is subject to third-party suits in its capacity as employer even if a private shipyard is not subject to such suits. Even though the FTCA limits the government's liability to that of "a private individual under like circumstances," the asbestos manufacturers argued that the United States should be analogized to a private shipyard owner that is not protected from tort actions by its employees by applicable exclusivity provisions. The reason for employing such an analogy, according to the asbestos manufacturers, is that the MWCA by its terms does not apply to the United States. Pet. App. 9a, 10a. Under the asbestos manufacturers' analogy, the United States would be directly liable to the plaintiffs and therefore subject to a third-party claim for contribution or indemnity as a joint tortfeasor. The court found the asbestos man-

ufacturers' reasoning "unpersuasive" (*id.* at 10a). It concluded that the appropriate analogy under the FTCA is to a private employer under like circumstances and, since a private compensation-paying employer in Maine is not subject to a direct tort suit or to a third-party tort suit based on an injury to an employee, the United States is not subject to such suits either (*ibid.*).

b. The court of appeals then considered petitioners' argument that the United States is subject to third-party tort actions under a dual capacity theory. This Court held in *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523, 528-532 (1983), that an employer subject to the LHWCA may be sued in tort by an employee under 33 U.S.C. 905(b) in its capacity as vessel owner, even though 33 U.S.C. 905(a) shields an employer from liability in its capacity as employer.[7] Petitioners argued that the United States is therefore subject to suit in its capacity as owner of the vessels in the Portsmouth Naval Shipyard because an analogous private shipyard would be subject to such a suit even if it were not subject to suit in its capacity as employer. Thus petitioners invoked Section 905(b) as the substantive law that provided the basis for a third-party action against the United States in its capacity as vessel owner.

The court of appeals first noted that federal employees are not subject to the LHWCA under 33 U.S.C. 903(a)(2). It doubted "whether we can ignore an express congressional exclusion of federal

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[7] Section 905(b) provides that "[i]n the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party * * *."

workers from coverage under the LHWCA, and employ an FTCA analogy by which coverage can be analogically presumed so as to render the United States vulnerable to a shipowner negligence suit" (Pet. App. 11a-12a). The court also noted that "where other federal policies * * * preclude what would otherwise be a potential cause of action, no action against the government may stand" (*id.* at 12a, citing *Johansen* v. *United States*, 343 U.S. 427, 436-440 (1952)), where the Court held that federal employees who receive compensation under the FECA may not sue the United States under the Public Vessels Act, 46 U.S.C. (& Supp. I) 781 *et seq.* However, the court "bracket[ed] these FTCA-based concerns" and assumed that the United States should be treated like any private shipyard (Pet. App. 13a).

Again relying on its decision in *Drake*, the court of appeals rejected petitioners' argument. The court of appeals explained in *Drake* that Section 905(b) was enacted in 1972 to replace the common law admiralty action for unseaworthiness with a statutory action governed by a negligence standard (Pet. App. 70a). Section 905(b) does not explicitly state that it provides only for *maritime* tort actions—*i.e.*, for tort actions that may be brought in the federal courts pursuant to their admiralty jurisdiction—but the court of appeals' "review of the origin and demise of longshore and harbor workers' unseaworthiness actions * * * led [it] to conclude that § 905(b) implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute" (Pet. App. 70a).

Since it had concluded that Section 905(b) encompasses only those torts cognizable in admiralty, the court of appeals in *Drake* considered whether

tort suits based on the employees' exposure to asbestos products while working in shipyards are properly considered maritime torts. The appropriate test for determining whether a tort is a maritime tort, under *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U.S. 249 (1972), and *Foremost Insurance Co.* v. *Richardson*, 457 U.S. 668 (1982), is whether the tort "occurred on navigable waters"—a "situs test"—and bore "a significant relationship to a maritime activity"—a "nexus test" (Pet. App. 72a). The court below noted that six circuits had considered whether a shipyard worker injured by exposure to asbestos could base a tort claim against asbestos manufacturers on admiralty law, and each had concluded that such a claim was not cognizable in admiralty because the nexus test was not satisfied (*id.* at 73a-74a).[8]

The court of appeals concluded in *Drake* that no maritime tort is presented in a case involving injury to a shipyard worker caused by exposure to asbestos. The court noted that the asbestos manufacturers, who now urged that a claim by an injured shipyard worker against a vessel owner under Section 905(b) is a maritime tort, had successfully argued that those same plaintiffs' claims against asbestos manufacturers were not cognizable in admiralty (Pet. App. 76a). The court concluded that "[t]he tort cannot be outside admiralty jurisdiction when sued upon in the

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[8] The court of appeals cited *Oman* v. *Johns-Manville Corp.*, 764 F.2d 224 (4th Cir.) (en banc), cert. denied, No. 85-356 (Nov. 4, 1985); *Myhran* v. *Johns-Manville Corp.*, 741 F.2d 1119 (9th Cir. 1984); *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); *Lowe* v. *Ingalls Shipbuilding, Inc.*, 723 F.2d 1173 (5th Cir. 1984); *Austin* v. *Unarco Industries*, 705 F.2d 1 (1st Cir.), cert. dismissed, 463 U.S. 1247 (1983); *Keene Corp.* v. *United States*, 700 F.2d 836 (2d Cir.), cert. denied, 464 U.S. 864 (1983).

primary action and then, by some magic, be transmuted into a maritime tort" (*ibid.*). Because the plaintiffs could not bring tort actions under Section 905(b) alleging injury caused by exposure to asbestos against a shipyard, the court of appeals concluded in *Drake* that there was no basis for a third-party action by asbestos manufacturers against a shipyard under that provision (Pet. App. 76a). Therefore, petitioners could not rely on Section 905 (b) to bring third-party actions against the United States in this case (Pet. App. 14a).[9]

ARGUMENT

Petitioners contend that review is warranted for two reasons. Petitioner Raymark,[10] but not petitioner Eagle-Picher, contends that the court of appeals erred in concluding that the United States is not subject to third-party actions in its capacity as em-

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[9] The court of appeals also concluded that Maine courts would not permit a suit against an employer based on its capacity as owner of the premises on which an employee was injured. The court noted that "the state courts have 'held with virtual unanimity' that workers' compensation-covered employers cannot be sued by their employees on premises liability theories" (Pet. App. 16a, quoting 2A A. Larson, *The Law of Workmen's Compensation* § 72.82, at 14-234 (1983)) and that the asbestos manufacturers had "not cited any authority that suggests that the Maine Supreme Judicial Court" would rule otherwise. Accordingly, the court of appeals saw no reason to certify a question to that court concerning whether it would permit a suit against a shipyard in its capacity as vessel owner (Pet. App. 17a). Petitioners have not challenged that part of the First Circuit's decision.

[10] Raymark's petition is joined by Owens-Illinois, Inc.; Armstrong World Industries, Inc.; Fibreboard Corporation; Owens-Corning Fiberglas Corp.; H.K. Porter Company, Inc.; Southern Textile Corporation; and Celotex Corporation.

ployer. This argument is insubstantial. Both petitioners argue that the court of appeals erred in concluding that the United States is not subject to third-party actions in its capacity as vessel owner. Contrary to petitioners' contentions, the court of appeals correctly determined that 33 U.S.C. 905(b) applies to maritime torts only and that the asbestos manufacturers' third-party claims lack a maritime nexus. The First Circuit's conclusions do not directly conflict with the holdings of any other circuit. Moreover, even if the court of appeals erred in holding that Section 905(b) is a maritime tort provision, it reached the correct result in this case because Section 8116(c) of the FECA bars direct actions against the United States, and hence third-party actions under the governing substantive law. Accordingly, further review is not warranted.

1. In its petition for a writ of certiorari in *Drake*, No. 85-1246, Raymark contends (at 35-41) that review of the court of appeals' conclusion that a shipyard is not subject to suit in its capacity as employer is warranted to resolve "confusion" over the meaning of this Court's decision in *Lockheed*. Raymark fails to understand, as the court of appeals explained in *Drake*, that "the Court stressed twice in the course of its opinion that the underlying substantive law granting Lockheed a right to indemnification was uncontroverted" (Pet. App. 84a). Accordingly, the court concluded that "*Lockheed* requires that we determine whether there is a basis in substantive law for defendants' third-party action" (*ibid.*).[11] Raymark does not attempt to identify

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[11] District courts that have considered this issue have likewise understood that it is necessary to identify a basis for a

the substantive basis for its third-party tort claim against the private shipyard in its petition in *Drake* (No. 85-1246). Because Raymark thus has not identified a basis in the underlying substantive law for its third-party claim against the United States in its capacity as employer, its claim that review is warranted to resolve confusion resulting from application of the *Lockheed* decision is unfounded.

Raymark's primary argument in its petition in this case is that the United States should be analogized under the FTCA to a private shipyard that is covered by the MWCA and the LHWCA but is not covered by the exclusivity provisions of those Acts (Pet. 28-40). Raymark contends that the United States should not be analogized to a private employer covered by the otherwise-applicable exclusivity provisions because it did not actually pay workers' compensation under those statutes (*id.* at 37). Although the United States did pay workers' compensation under the FECA, Raymark contends that that does not matter, apparently because the FECA does

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contribution or indemnity claim. *Johns-Manville Sales Corp.* v. *United States*, 622 F. Supp. 443, 451 (N.D. Cal. 1985); ("*Lockheed* does not confer upon a third party a right to sue, rather the Supreme Court just said that the FECA does not present a bar to third-party suits.") (Pet. App. 112a, 126a); *In re All Asbestos Cases*, 603 F. Supp. 599, 603 n.3 (D. Hawaii 1984) (citations omitted) ("*Lockheed* did not affirmatively confer upon third parties an indemnity remedy against the United States; rather, as the Court made clear, the existence of such a remedy is governed by the 'underlying substantive law.' "); *Colombo* v. *Johns-Manville Corp.*, 601 F. Supp. 1119, 1126 (E.D. Pa. 1984) (brackets in original) (" '*Lockheed* does not automatically entitle [a defendant] to bring an indemnity or contribution action against the United States . . . [I]t is necessary . . . to look at the . . . substantive law in each instance.' "), quoting *Prather* v. *Upjohn Co.*, 585 F. Supp. 112, 113 (N.D. Fla. 1984).

not apply to private parties. Under Raymark's analogy the United States could be sued in tort by its employees because no exclusivity provision would bar such suits. That direct liability would provide the substantive basis for third-party tort suits because the United States would be a joint tortfeasor.

Raymark's argument is obviously contrary to Congress's intention in enacting the FTCA. First, it completely overlooks the fact that Section 8116(c) of the FECA provides that the United States may not be sued by its employees. Because tort suits by its employees are barred by the FECA, the United States is properly analogized to a private party that is immune from tort suits by its employees. Therefore, the United States is not a joint tortfeasor and there is no basis for a third-party suit against the United States. Putting the FECA aside, and treating the United States the same as any private shipyard in Maine, the proper analogy would be to a private compensation-paying shipyard in Maine. Such a shipyard could not be sued by its employees because the exclusivity provisions of the MWCA and the LHWCA both bar such suits.[12] Raymark's wholly

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[12] Raymark acknowledges that most jurisdictions require joint tortfeasor status as an element of a contribution or indemnity claim, but asserts that Maine is an exception to that rule (85-1246 Pet. 13). Raymark misleadingly cites two cases that do not involve employer liability (*id.* at 13-14) and fails to cite other cases construing the exclusivity provision of the MWCA. As the court of appeals stated in *Drake*, that exclusivity provision "has been unequivocally interpreted by the Maine Supreme Judicial Court to provide a covered employer with immunity from third-party claims arising from work-related injuries to its employees that 'extends to all non-contractual rights of contribution and indemnity'" (Pet. App. 82a, quoting *McKellar* v. *Clark Equipment Co.*, 472 A.2d 411, 416 (1984)). In *Roberts* v. *American Chain & Cable Co.*, 259

hypothetical analogy, which ignores the exclusivity provision of the FECA because the FECA does not apply to private parties and ignores the exclusivity provisions of the MWCA and the LHWCA because those Acts apply only to private parties, is clearly inappropriate.[13] It would expose the United States to greater liability than any similarly situated private party.

2. Petitioners Raymark and Eagle-Picher assert that the court of appeals erred in dismissing their third-party actions against the United States in its capacity as vessel owner. Eagle-Picher contends that the court of appeals erred in concluding that Section 905(b) of the LHWCA applies only to maritime torts. Raymark appears to agree with Eagle-Picher, but primarily argues that the court of appeals erred in its application of the maritime nexus test enunciated in *Executive Jet*.

a. As an initial matter, we think that the court of appeals (while reaching the correct result) ana-

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A.2d 43, 49 (1969), the Maine Supreme Judicial Court held that the exclusivity provision of the MWCA exempts an employer "from any duty of contribution to a third-party tortfeasor whose concurrent negligence with that of the employer has caused the accident." The court added that along with barring the impleading of an employer by a third-party tortfeasor for contribution, the MWCA "equally precludes such procedures on the ground of indemnification upon the so-called quasi contract theory or implied-promise-in-law basis" (*id.* at 51).

[13] Other courts have ruled that where the law applicable to private parties bars third-party tort recovery against those immune to suit by underlying plaintiffs, FTCA third-party actions against the government based on injuries to FECA-covered workers must be dismissed. See, *e.g.*, *Prather* v. *Upjohn Co.*, 585 F. Supp. 112, 113-114 (N.D. Fla. 1984) (contribution barred by both Florida Contribution Among Tortfeasors Act and Florida Workmen's Compensation Act).

lyzed this issue in an unnecessarily complicated manner by deciding to "bracket [its] FTCA-based concerns" and to "assume for the purposes of [its] analysis that defendants seek to maintain a third-party contribution and indemnity action against a private shipyard which owns the ships on which the plaintiffs worked" (Pet. App. 12a). In so doing the court of appeals adopted an inappropriate analogy. Although a private shipyard in Maine was subject to suit by its employees under Section 905(b) in its capacity as vessel owner prior to the amendment of Section 905(b) in 1984 to overrule *Jones & Laughlin* (see pages 20-21, *infra*), the United States was not subject to such direct suits. Section 8116(c) of the FECA bars suits by government employees who may receive workers' compensation payments against the United States. That provision bars direct suits against the United States in its capacity as vessel owner. *Patterson* v. *United States*, 359 U.S. 495, 496 (1959) (FECA bars suit by employee under Suits in Admiralty Act); *Johansen* v. *United States*, 343 U.S. 427, 436-440 (1952) (FECA bars suit by employee under Public Vessels Act). Therefore, the United States was not subject to direct suit under Section 905(b) by the plaintiffs in this case, as they recognized by not suing the United States. In our view, the appropriate analogy is not to a private employer subject to direct suit in its capacity as vessel owner under Section 905(b), but to an employer that is not subject to such suits, because immunity from direct suit is a relevant circumstance and the exclusivity provision of the FECA bars direct suit aginst the United States by its employees.[14]

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[14] The district court, like the court of appeals, employed an inappropriate analogy because it rejected our argument that the United States should be analogized to a private employer

As the court of appeals recognized, the governing substantive law applicable to this case requires that a third-party tort recovery may be secured only against a party that is potentially subject to tort liability to the plaintiffs.[15] Because there is no basis for a direct suit under Section 905(b) against the United States under the appropriate analogy since Section 8116(c) of the FECA bars such suits, there is no basis for a third-party suit against the United States either. That is so regardless of whether a private shipyard would be subject to such direct, and therefore to indirect, suits. Therefore, even if the court of appeals erred in concluding in *Drake* that Section 905(b) applies to maritime torts only, it reached the correct result in this case.

b. In any event, the court of appeals correctly held that Section 905(b) applies to maritime torts only. Petitioner Eagle-Picher (Pet. 15-16) notes that Section 905(b) does not expressly provide that it is a maritime tort provision. However, as the court of appeals observed, the history of Section 905(b) shows that Congress intended that provision to apply only to torts cognizable in admiralty. The common law of admiralty provided a negligence action that could be brought by shipyard workers (Pet. App. 70a). In *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), the Court ruled that a longshoreman injured on a vessel lying in navigable waters could bring an "un-

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immune from direct suit by the FECA and instead concluded that the United States should be considered the same as any private shipyard employer in Maine (Pet. App. 25a). See note 5, *supra*.

[15] As we have explained (pages 11-12, *supra*), this Court's decision in *Lockheed* recognizes that there must be a basis for the third-party claim in the underlying substantive law.

seaworthiness" action, an absolute liability action previously limited to seamen. In 1972 Congress enacted Section 905(b) to return the law "to its pre-*Sieracki* state" (Pet. App. 70a). In overturning *Sieracki*, the court of appeals correctly concluded, Congress did not intend to enlarge the scope of the negligence action available under the common law of admiralty, but merely intended to reinstate it.[16] Accordingly, the court of appeals held, the asbestos manufacturers would have a substantive basis for their third-party claims against the private shipyard in *Drake* in its capacity as vessel owner only if the plaintiffs' claims against the shipyard would have satisfied the requirements for admiralty jurisdiction set out in *Executive Jet*.

The court of appeals recognized that "there are cases which have either ignored or overlooked the *Executive Jet* nexus test in determining whether a tort was cognizable under Section 905(b)" (Pet. App. 76a-77a). Petitioners cite *Hall* v. *Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), cert. denied, No. 84-1819 (Oct. 7, 1985), as presenting an express con-

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[16] The court below noted that other courts of appeals had agreed with that conclusion, citing *Holland* v. *Sea-Land Service, Inc.*, 655 F.2d 556, 559 (4th Cir. 1981), cert. denied, 455 U.S. 919 (1982) (Section 905(b) did not "enlarge the traditional jurisdiction of admiralty over maritime torts"); *Christoff* v. *Bergeron Industries, Inc.*, 748 F.2d 297, 298 (5th Cir. 1984) (Section 905(b) "neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty"); and *Harville* v. *Johns-Manville Products Corp.*, 731 F.2d 775, 787 n.9 (11th Cir. 1984) (Section 905(b), "rather than creating a new cause of action, merely preserves certain preexisting remedies to injured workers against third parties").

flict (85-1253 Pet. 17; 85-1288 Pet. 52). *Hall* involved three cases brought under Section 905(b) by shipyard workers who were injured while working on partially-constructed ships. The court of appeals in *Hall* considered claims raised by two of the three defendants that there was no basis for federal jurisdiction. Those two defendants argued that the Fifth Circuit had held in *Lowe* v. *Ingalls Shipbuilding, Inc.*, *supra*—one of the cases holding that suits involving shipyard workers injured by exposure to asbestos are not cognizable in admiralty—that shipbuilding is not a maritime activity and, since admiralty jurisdiction was "the sole jurisdictional basis relied upon" by two of the plaintiffs (746 F.2d at 296 n.2), their actions had to be dismissed. The court held that in determining whether admiralty jurisdiction existed for a Section 905(b) action, a court should not consider the maritime nexus test for admiralty jurisdiction enunciated in *Executive Jet* but instead should only apply a maritime situs test (746 F.2d at 303). Since the three plaintiffs in *Hall* were injured on partially-built ships that were floating on navigable waters, the court concluded that there was a proper basis for admiralty jurisdiction. The court suggested that en banc consideration might be warranted to determine whether admiralty jurisdiction exists for cases involving ship construction (746 F.2d at 301).

Review is not warranted to resolve any conflict between the decision in *Hall* and the First Circuit's decisions. The decision in *Hall* is not in conflict with the holding in *Drake* that Section 905(b) applies to maritime torts only, the holding that Eagle-Picher contends is wrong. In fact, the court of appeals in *Drake* stated that "[i]nsofar as the *Hall* panel held that only maritime torts are cognizable under § 905 (b) we are in agreement" (Pet. App. 79a). The

disagreement the First Circuit expressed with the decision in *Hall* was with its peculiar statement that the maritime nexus test applied in *Executive Jet* does not apply in determining whether there is admiralty jurisdiction to hear a Section 905(b) claim, a view for which there is no basis "in law, logic, legislative history, or policy" (Pet. App. 79a).

Moreover, the result in *Hall* and the result in this case may be reconcilable. The court in *Hall* appeared to think that all injuries on ships under construction must be treated the same in terms of whether they have a maritime nexus. But that is not so. The essence of the holdings in cases such as *Drake* and *Lowe* is that asbestos cases do not have a maritime nexus because they are part of a land-based problem normally decided under state law principles, not that all injuries on ships under construction do not have a maritime nexus. See note 21, *infra*. The particular injuries at issue in the cases in *Hall*—which the court did not describe—may have had a relationship to traditional maritime concerns. The Fifth Circuit may have declined to review *Hall* en banc (746 F.2d at 294), despite the panel's suggestion that rehearing was appropriate (*id.* at 301), because it concluded that the injuries at issue, unlike the injuries at issue in asbestos cases, had a maritime nexus.[17]

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[17] The panel in *Hall* itself suggested that the cases before it were distinguishable from asbestos cases. The court stated that asbestos cases "involve the delicate question whether the federal interest in an amphibious worker's personal injury claims is sufficiently strong to justify federal courts supplanting state law with the federal common law of admiralty," a question that "is not relevant to the present facts" (746 F.2d at 302 n.16).

Nor, contrary to Raymark (Pet. 53), is any conflict presented by *Lundy* v. *Litton Systems, Inc.*, 624 F.2d 590 (5th

Review at this time is especially unwarranted because district courts in the Third and the Ninth Circuits have recently held that the United States is subject to third-party actions brought by asbestos manufacturers in its capacity as vessel owner. *Johns-Manville Sales Corp.* v. *United States*, 622 F. Supp. 443, 454 (N.D. Cal. 1985); Pet. App. 132a; *In re All Asbestos Cases*, 603 F. Supp. at 605-606; *Colombo*, 601 F. Supp. at 1132-1138. Those courts did not consider the analysis followed by the First Circuit in this case, as the First Circuit noted (Pet. App. 14a & n.9). The United States has recently sought reconsideration in those courts on the basis of the First Circuit's decision in this case and has requested permission to pursue interlocutory appeals in the alternative. It may be that all the circuits will agree with the First Circuit that the United States is not subject to such suits, in which case there will be no need for review by this Court.[18] If a conflict in the circuits develops, on the other hand, the Court may consider the issue at that time, when the nature of any conflict is certain to be more clear than is the nature of the disagreement between the First and the Fifth Circuits.

Another factor also makes review of this issue unwarranted at this time. Congress amended Section 905(b) in 1984 to overrule *Jones & Laughlin*. Sec-

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Cir. 1980), or *McCarthy* v. *The Bark Peking*, 716 F.2d 130 (2d Cir. 1983), cert. denied, 465 U.S. 1078 (1984). In those cases, the courts only decided whether the plaintiffs were covered by the LHWCA at all, not whether the alleged torts were maritime torts. See Pet. App. 76a-77a nn.9, 10.

[18] Even if another circuit disagrees with the First Circuit's conclusion that Section 905(b) applies to maritime torts only, that circuit might well order dismissal of third-party actions against the United States on the alternative ground that the First Circuit did not reach. See pages 14-16, *supra*.

tion 905(b) now clearly provides that a shipyard employer is not subject to direct suit or to third-party actions under that provision in any capacity, including its capacity as vessel owner.[19] Although the amended statute does not govern these or other pending asbestos cases because it applies only in cases where injuries manifested themselves after the statute was amended (see Pub. L. No. 98-426 § 28(c), 98 Stat. 1655), the fact that the statute has been amended diminishes the need for review, particularly in the absence of a clear conflict. There may well never be a need for this Court to consider whether Section 905(b) prior to its amendment authorized a third-party suit against the United States in its capacity as vessel owner.[20]

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[19] Congress in 1984 added a sentence to Section 905(b) providing that if an injured "person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was owner * * * of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer)" (Pub. L. No. 98-426, § 5(b), 98 Stat. 1641).

[20] In addition to alleging that review is warranted because of a conflict between the First Circuit's decisions and the decision in *Hall*, Eagle-Picher (Pet. 19-20) argues that the First Circuit's decisions conflict with *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297 (1983), and *Perkins* v. *Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982). However, neither of those cases involved a tort suit. Rather, the issue presented in those cases was whether certain employees were covered by the LHWCA for purposes of receiving workers' compensation. The court of appeals recognized in *Drake* that "*Perini* was concerned solely with *compensation*, not with maritime tort jurisdiction, and these two boundaries have for a long time been quite distinct" (Pet. App. 79a (emphasis in original)). The Fifth and Ninth

c. Petitioner Raymark errs in contending (Pet. 41-57) that the court of appeals misapplied the nexus test enunciated in *Executive Jet*. As the court below noted (Pet. App. 73a-74a), six circuits have concluded that shipyard workers may not sue asbestos manufacturers in admiralty. Those decisions are correct, as Raymark acknowledges (Pet. 44-45).[21] As

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Circuits have also explicitly recognized that "maritime employment" status under Section 902(3) for workers' compensation purposes is not the same as "maritime nexus" for determining admiralty jurisdiction over a tort action. See *Rohde* v. *Southeastern Drilling Co., Inc.*, 667 F.2d 1215, 1218-1219 (5th Cir. 1982); *Thibodaux* v. *Atlantic Richfield Co.*, 580 F.2d 841, 846 n.14 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979); *Ramos* v. *Universal Dredging Corp.*, 653 F.2d 1353, 1359 (9th Cir. 1981). Therefore, *Perini* does not control the decision in this case and the First Circuit's decisions are not in conflict with *Perkins*.

[21] In *Harville*, the Eleventh Circuit summarized the reasons why suits based on injury resulting from exposure to asbestos do not have a sufficient relationship with admiralty concerns to satisfy the maritime nexus test. The court explained that "[a]dmiralty's purposes are various but limited. In *Executive Jet* the Supreme Court described admiralty as dealing with navigational rules, apportionment of liability for maritime disasters, protection of seamen aboard ship, and establishment of uniform rules for maritime liens, captures of prizes, liability for cargo damage, and claims for salvage. 409 U.S. at 269-70. The Court has also stated that 'the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce.' *Foremost Insurance*, 457 U.S. at 674." 731 F.2d at 786 (citation omitted). Asbestos cases are not concerned with such matters, the court continued: "We can foresee no way in which a result in this case in favor of either the land-based shipyard workers or the asbestos manufacturing defendants will have any more than the most attenuated impact on maritime commerce. None of the issues that the Supreme Court listed in *Executive Jet* are involved. Rather, the issues that this litigation presents are identical to

the court of appeals concluded (Pet. App. 76a), if the asbestos-related injuries of shipyard workers are not maritime torts when injured workers sue asbestos manufacturers, they do not become maritime torts merely because a party is sued in its capacity as vessel owner.

Raymark contends to the contrary, insisting that the "need for uniformity" in the treatment of vessel owners (Pet. 47) warrants the conclusion that "vessel owner negligence gives rise to a maritime tort" in every case (*id.* at 46). But the presence of a vessel owner as a party does not by itself require a finding of maritime nexus. See *Sohyde Drilling & Marine Co.* v. *Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir.), cert. denied, 454 U.S. 1081 (1981); *West* v. *Chevron U.S.A., Inc.*, 615 F. Supp. 377 (E.D. La. 1985). The court of appeals recogized that, because it focused on the *cause* of the injury suffered by a shipyard worker (Pet. App. 75a n.8), workers injured on a vessel might have different bases for their negligence actions depending on whether the cause of the injury suffered had a maritime nexus, such as an injury caused by a defective winch, or whether the cause of the injury was essentially land-based, as is the case with injuries caused by exposure to asbestos. This would lead to different treatment of vessel owners depending on the cause of injuries. However, as the court of appeals stated: " 'Whatever anomalous results may follow from distinguishing between harbor workers according to the maritime

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those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution." *Ibid.*

nature of the hazards they encounter are at least offset, if not outweighed, by the anomalous results of treating construction workers injured by asbestos poisoning differently depending on whether they were installing asbestos in a ship or in an office building overlooking the harbor. *The state has an interest in providing uniform treatment to these two like workers.*' " Pet. App. 15a (citation omitted; emphasis in original), quoting *Austin*, 705 F.2d at 13.[22] Raymark has not explained why the need for uniform treatment of vessel owners outweighs the interests favoring uniform treatment of asbestos workers.[23] Because the courts of appeals are in agreement that injuries resulting from exposure to asbestos are not admiralty concerns, but are properly decided according to state

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[22] The court of appeals observed, in denying rehearing in this case, that while petitioners' concern that there be a uniform standard governing a vessel's duty to warn of hidden dangers aboard ship was a factor to consider in determining whether there was a maritime nexus, the need for uniformity favored a finding of no maritime nexus in these cases. The court noted that "[i]f Drake ha[d] sued [Bath Iron Works] (BIW) as *pro hac vice* vessel owner for failure to warn or protect against a dangerous condition, the questions would have been whether working with asbestos was dangerous and whether BIW knew or should have known of it. These are the same questions that would arise if Drake had worked with asbestos, without warning or protection, on a ship not owned by BIW, or in one of BIW's warehouses on land." Pet. App. 91a.

[23] Because the court of appeals recognized that its holding that the injuries involved in this case are not maritime torts depended on the cause of the injuries, the cases cited by Raymark (Pet. 54-55 n.15) are not in conflict with the decision here. The injuries in those cases were not clearly related to land-based problems, but rather were intrinsic to the condition of a vessel.

law, there is no merit to Raymark's contention that this Court should review the First Circuit's application of the maritime nexus test in this case.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

JOSEPH B. COX, JR.
DAVID S. FISHBACK
Attorneys

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